Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1393

HOWARD COURTWRIGHT; SAM CUTRELL; RICHARD CYR; JIM DOYLE; CARL GUSTAFSON; GENE HINES; TERRY HUCKINS; DON PETERS; ROGER PIERCE; ELDON RHODES; JOE RIELLY; JON SCROGGINS; DENNIS SMITH; WAYNE STALLSWORTH; GENE TUGGLE; PAUL ULLERICH; and FRED WOOLSEY,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; SAFEWAY STORES, INCORPORATED; RETAIL CLERKS UNION, LOCAL NO. 7; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL NO. 537; WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION, LOCAL NO. 452; BAKERY WAGON DRIVERS AND SALESMEN'S LOCAL UNION NO. 219; and DISTRICT LODGE NO. 86, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT SAFEWAY STORES, INCORPORATED, IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Petition, Appendix at 10-19), has been officially reported at 611 F.2d 795.

JURISDICTION

The opinion of the Court of Appeals unanimously affirming the trial court was entered on December 5, 1979. Petitioners did not seek rehearing, but seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Was the unanimous decision of the Court below correct when it found no abuse of discretion in the trial court's rulings denying Petitioners' prayer for a declaration that the transfer provision was void *ab initio* where the trial court entered a decree by consent of all the parties pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII"), which, for the purpose of encouraging the movement of employees who may have been discriminatorily assigned to less desirable jobs, permitted employees of Respondent Safeway Stores, Incorporated ("Safeway") to transfer between bargaining units with a carry-over of accumulated seniority, thereby superceding provisions of various collective bargaining agreements to the contrary, and where the transfer provision was subsequently deleted by consent of all the parties and resulted in minimal impact upon the Petitioners (Intervenors below) during the 18 months within which it was in effect?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the provisions of Title VII cited in the Petition, also applicable herein is Federal Rules of Civil Procedure, Rule 60(b)(5) and (6), which provides in pertinent part as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .

> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment."

ADDITIONAL STATEMENT OF THE CASE

Safeway believes that the operative facts are fairly summarized by the opinion of the Court of Appeals (Petition, Appendix at 11-13).

Of particular importance to whether this Court should grant the writ sought is the fact that the transfer provision, designed to further Title VII goals by encouraging the movement of employees who may have been discriminatorily assigned to less desirable jobs, was part of a decree entered by consent of the parties. There thus was no adjudication that Safeway's seniority system was "bona fide," entitling it to the protection of Section 703(h) of Title VII.

Further, the transfer provision was in effect for only approximately 18 months, at which time it was deleted from the decree, again by consent of all the parties. During those 18 months, six or seven employees transferred into the truck driver bargaining unit, which consisted of approximately 275 employees and of which Petitioners are members. Because none of the transferees had a company seniority date earlier than September 19, 1972, a substantial majority of the Petitioners were senior to them and were unaffected by such transfers. Only five of the transferees were senior to any of the Petitioners, and of those five, two are members of minority groups. The transfer provision, accordingly, had only minimal effect on the seniority of the bargaining unit as a whole and upon the rights of the Petitioners in particular.

It is based upon the facts recited in its opinion and these facts that the Court of Appeals unanimously affirmed the rulings of the trial court, entered in the exercise of its sound discretion pursuant to Rule 60(b), in declining to delete or modify the transfer provision until it was deleted by consent of the parties.

REASONS WHY THE WRIT SHOULD BE DENIED

The decision of the Court of Appeals was correct and was in accord with the decisions of this Court and the courts of appeals. It is apparent from the Petition that the basis for Petitioners' claim is their dispute with the trial court concerning its exercise of discretion in reviewing the final judgment. Such a dispute, confined so clearly to a unique set of facts concerning interpretation and application of a decree entered by consent, simply does not involve questions worthy of review by the grant of certiorari.

1. *The decision below does not conflict with decisions of this Court or the courts of appeals in reviewing trial court rulings under Rule 60(b).*

Petitioners do not now challenge the standards applied by the Court of Appeals in reviewing the trial court's rulings under Rule 60(b). Rather, for the first time they now claim, without supporting authority, that the decree and the trial court's later clarifying order are not "final" as to Petitioners, and that the "strictures" of Rule 60(b) do not apply to them. This assertion is based upon a claim that they are not bound by the consent to the transfer provision of their exclusive bargaining agent, Delivery Drivers, Warehousemen and Helpers, Local Union No. 435 ("Local 435"), because their seniority interests are in conflict with those of the majority of the bargaining unit.

The courts of appeals have recognized that finality of a decree would be unattainable were Petitioner's argument to be adopted, as the nature of a seniority system is such that conflicting interests always exist between various segments of a bargaining unit. In a decision of the Third Circuit Court of Appeals in a similar fact context, *Bolden v. Pennsylvania State Police,* 578 F.2d 912 (3d Cir. 1978), that court held "that a labor organization is an adequate representative of the interests of the majority of its members . . . and that insofar as its interests are not antagonistic to those of the majority of its members, the members are bound by the judgment." *Id* at 918. This decision was noted without disagreement by the Court of Appeals below (Petition, Appendix at 13). Safeway is aware of no contrary authority of this Court or of the courts of appeals. As a small minority of the membership of Local 435, the Petitioners are thus bound by the consent of Local 435 to the decree in general and to the transfer provision in particular.

Thus, the Court of Appeals correctly concluded that the trial court's ruling should not be disturbed on appeal absent a showing that the trial court abused its discretion under Rule 60(b). *S.E.C. v. Thermodynamics, Inc.* 464 F. 2d 457, 459 (10th Cir. 1972); *Winfield Associates, Inc. v. Stonecipher,* 429 F. 2d 1087, 1090 (10th Cir. 1970). This is especially so in the case of a consent decree, where the trial court has broad discretion in its administration. *Franks v. Bowman Transp. Co., Inc.,* 424 U.S. 474 (1976).

Before the Court of Appeals, the Intervenors had objected to the transfer provision in part by claiming that a grant of enhanced seniority rights to all post-decree transferees, rather than to all employees or to minority transferees only, did not fulfill a legitimate purpose of Title VII. In applying the standards of a court reviewing a trial court ruling under Rule 60(b), the Court of Appeals correctly observed that modification of a decree was not appropriate "merely because it reaches a result which could not have been forced on the parties through litigation." (Petition, Appendix at 16). As the Court of Appeals further stated:

> "The fact that a consent decree exceeds the law by prohibiting lawful conduct, *Swift & Co. v. United States,* 276 U.S. 311, 328-31 (1928), or by granting an unauthorized remedy, *Walling v. Miller,* 138 F.2d 629 (8th Cir. 1943), *cert. denied,* 321 U.S. 784 (1944), does not render it void. Such efforts may be grounds for reversal on appeal of the judgment, but they are not grounds for collateral attack." Id.

In asserting that they were not permitted to make an evidentiary showing of changed conditions warranting modification of the decree as required by this Court in *United States v. Swift & Co.,* 286 U.S. 106 (1932), Petitioners ignore the fact that the only changed conditions they have ever claimed is the announcement of this Court's opinion in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). The Court of Appeals was clearly correct in deciding such a question of law without the need for an evidentiary hearing.

2. *The decision below does not conflict with decisions of this Court or the courts of appeals in approving decrees by consent which modify seniority systems.*

Finally, Petitioners argue that this Court's decision in *Teamsters v. U.S., supra,* in a fashion analogous to the provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104, removed subject matter jurisdiction from the federal courts to modify seniority systems which, as here, are alleged to be "bona fide" under § 703(h) of Title VII. Petitioners cite no decisions of this Court or the courts of appeals for this analogy.

More importantly, they ignore a fundamental distinguishing policy of Title VII which is to encourage voluntary settlement. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). The parties herein observed that policy by reaching agreement concerning, among many other things, the transfer provisions contained in the decree. Accordingly, no adjudication was made concerning the "bona fides" of the seniority system or its effect upon pre-Act or post-Act discriminatees. For the trial court to have adjudicated the "bona fides" of the seniority system would have undermined the major impetus of settlements, namely, to avoid the uncertainties and expense of litigation. *Florida Trailer & Equip. Co. v. Deal,* 284 F.2d 567 (5th Cir. 1960). It was in part on this basis that the Court of Appeals correctly found no conflict between this Court's decision in *Teamsters v. U.S., supra,* and the transfer provision of the decree.

There is no conflict between the courts of appeals on this issue. In *Airline Stewards and Stewardesses Ass'n., Local 550 v. American Airlines, Inc.,* 573 F.2d 960 (7th Cir. 1978), the Seventh Circuit Court of Appeals followed these principles in a case very similar to the instant case. There, the district court approved the settlement of a case brought pursuant to Title VII. The settlement agreement provided for reinstatement for discharged discriminatees of their accrued occupational seniority from the time of their discharge. The intervenor-union argued that *Teamsters v. U.S., supra,* required that the district court decide the merits of plaintiffs' claims prior to deciding whether the settlement agreement was appropriate. The district court declined to do so. The court of appeals agreed, stating:

> "While we believe that in a controverted Title VII case the issues raised by intervenor would be both difficult and interesting, we must recognize that we are here reviewing the propriety of a settlement and not a judgment rendered after a trial.
>
> * * *
>
> "It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately

> the merits of each claim. The rule urged by the intervenor would most seriously discourage efforts to settle Title VII cases, and we refuse to sanction such a result." *Id.* at 963-964.

Application of similar judicial analysis to the instant consent decree compelled the Court of Appeals below to rightfully agree with the district court's conclusion: "A Consent Decree would be worthless if it could be attacked on the ground that had the Court made a particular determination, such relief would then not be statutorily available." (Petition, Appendix at 19).

In the context of a consent decree, therefore, and given that the transfer provision is no longer in effect, the Court of Appeals' decision is not in conflict with the tenets annnounced in *Teamsters v. U.S., supra.*

CONCLUSION

The Court of Appeals held that the district court did not abuse its discretion in administrating the consent decree. A decision upholding the exercise of discretion by a district court is not grist for the granting of a petition for certiorari. Furthermore, the Court of Appeals' decision is based upon a consent decree as opposed to an adjudication on the merits. Therefore, the "bona fides" of the seniority system have never been judicially established. In this context, the Court of Appeals' decision does not conflict with this Court's decision in *Teamsters v. U.S., supra.* The petition for certiorari should be denied.

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